

impede a requester from obtaining Department of the Navy records promptly. Naval activities shall provide assistance to requesters to help them understand and comply with procedures established by this instruction. Fees shall not be used to discourage requesters (see subpart D of this part).

(c) *Prompt action on requests.* When a requester complies with the procedures established in this instruction for obtaining naval records, the request shall receive prompt attention. A reply shall be dispatched within 10 working days, unless a delay is authorized. If a naval activity has a significant number of requests (i.e., 10 or more), the requests shall be processed in order of receipt. This, however, does not preclude a naval activity from acting on a request which can be easily answered, regardless of its ranking within the order of receipt. A naval activity may also expedite action on a request regardless of its ranking within the order of receipt upon a showing of exceptional need or urgency. Exceptional need or urgency is determined at the discretion of the activity processing the request.

(d) *Use of exemptions/discretionary release.* Department of the Navy policy is to make records publicly available, unless they qualify for withholding under one or more of the nine FOIA exemptions (see subpart B of this part for an in-depth review of the exemptions). Naval activities may elect to make a discretionary release. A discretionary release to one requester may, however, preclude the withholding of similar information under a FOIA exemption if subsequently requested by the same individual or someone else. Suggest the following language be included with the discretionary release of any record that could be subject to withholding:

The information you requested is subject to being withheld under section (b) of the Freedom of Information Act. The release of this material to you by the Department of the Navy is discretionary and does not constitute a waiver of our right to claim this exemption for similar records in the future.

Additionally, a discretionary release is generally not appropriate for records exempt from disclosure under exemptions (b)(1)—classified; (b)(3)—exempted by statute; (b)(4)—trade secret/proprietary; (b)(6)—personal privacy; and

(b)(7)(C)—personal information contained in investigatory records which if released would constitute an unwarranted invasion of privacy. Exemptions (b)(4), (b)(6), and (b)(7)(C) cannot be claimed for information which was supplied by the requester of the information.

(e) *Public domain.* Nonexempt records released under this instruction are considered in the public domain. Exempt records released under this instruction or other statutory or regulatory authority may be considered to be in the public domain only when their release constitutes a waiver of a FOIA exemption. When release does not constitute such a waiver, such as disclosure to a properly constituted advisory committee or a Congressional Committee, the released records do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, this instruction applies if the same individual seeks the records in a private or personal capacity.

(f) *Creating a record.* (1) A record must exist and be in the possession and control of the Department of the Navy at the time of the search to be considered subject to FOIA. Mere possession of a record does not presume departmental control; such records, or identifiable portions, should be referred to the originating activity for direct response to the requester. There is no obligation to create or compile a record to satisfy a FOIA request. A naval activity may, however, compile a new record if it is a more useful response to the requester, or less burdensome to the naval activity than providing existing records, and the requester does not object. The cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. See subpart D of this part for fees.

(2) With respect to electronic data, the issue of whether records are actually or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data